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IN THE

Supreme Court of The United States

OCTOBER [redacted] TERM

1918

JAMES E. WHITEHEAD
Appellant.

vs.

NO. 496 184

JAMES O. GALLOWAY, WINFIELD S. PRESGROVE AND THE ATKINSON, WARREN AND HINLEY CO.
Appellees.

BRIEF OF APPELLEES.

H. A. LEDBETTER,
Attorney for Appellees.

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The statement of facts contained on pages 1 to 5 inclusive of the brief of the appellant is substantially correct, but the conclusion drawn from the facts by the appellant, we cannot agree with, and by reason of which we desire to make a statement and from our statement we will draw our conclusions.

The land in controversy is at this time situated in Carter County, Oklahoma, but before statehood and subsequent to June 21, 1906, it was the Twenty-Ninth Recording District, Indian Territory, and prior to June 21, 1906, it was in the Twentieth Recording District, Ryan, Indian Territory.

The appellant purchased the land June 27, 1906 and recorded his deed at Ryan the Twentieth Recording District. The Appellant did not take possession of the land and at no time did he ever place of record his deed either at Duncan, the Twenty-Ninth Recording District, or in Carter County, Oklahoma, and the first assertion of any right, title, claim or interest in or to said land by the appellant was on the 8th day of June, 1911, when this suit was filed.

James O. Galloway, one of the appellees, purchased the land on the 16th day of November, 1906, from Wilburn Adams (being the same person appellant purchased from), and immediately went into possession of the land, and Galloway subsequently sold the land to Presgrove, and Presgrove mortgaged the same to the Travelers Insurance Co., and also to Atkinson, Warren and Hinley Co., and the Travelers Insurance Co., assigned its mortgage to Atkinson, Warren and Hinley Co. On the 30th day of June, 1906, C. M. Campbell, Clerk of the United States Court within and for the Southern District of Indian Territory, appointed C. N. Jackson deputy clerk for the Twenty-ninth Recording District, Duncan, Indian Territory, and Jackson took his oath of office July 7, 1906.

The trial court at Ardmore entered its judgment for the appellees and an appeal was taken to the Supreme Court of Oklahoma and there affirmed. (R. 7).

From the foregoing statement of facts we feel that the opinion of the Supreme Court of Oklahoma was proper and should be affirmed by this court for the reasons as follows:

First: Congress having created the Duncan Recording District on the 21st day of June, 1906, even though the deputy clerk was not appointed until July 7, 1906, it was not the duty of the deputy clerk at the Ryan Recording Dis-

trict to transfer the instruments recorded subsequent to June 21, 1906, and it was not incumbent on the appellees to search the records of the Ryan Recording District when their purchase was made in November, 1907.

Second: That the appellent has been guilty of laches to such an extent that equity estops him from claiming title to the land as against the appellees.

Third: Counsel for appellant speaks of the opinion as "The Opinion of Commissioner Wilson", as if the opinion was not by the Supreme Court of Oklahoma. The legislature of Oklahoma created a Supreme Court Commission which was given authority to write opinions but such opinions were to be adopted by the Supreme Court proper. This opinion was adopted in whole as is shown at the bottom of the opinion. See page 13 of the record.

The deed of the appellant was executed June 27, 1906. (R. p. 33), which was six days after congress had created the Duncan Recording District (R. p. 31). We wish to call the Court's attention to this Act of Congress creating the Twenty-Ninth Recording District, which will be found in Volume 9, Fed. Stat., Annotated commencing on page 214. The latter portion of the section having particular reference to the creation of the Duncan Recording District. It will be noted that congress created the Recording District by metes and bounds. For reasons better known to congress, the judge of the United States Court for the Eastern District of the Indian Territory was given authority to create and establish by metes and bounds the Thirtieth Recording District, which was at Wilburton, but as to all other newly-created districts. including that of Duncan, congress saw fit to definitely locate by metes and

bounds the newly-created districts, and we can but come to the conclusion that all persons dealing in property affected by this change, including the appellant, would be bound by this law. In other words, when the appellant bought the land, congress had definitely created by metes and bounds the Duncan Recording District. Now, by the act of February 19, 1903, 32 Statute at Large 841, Vol. 10 Fed. Stat. Anno. 130, congress had extended Chapter 27 of Mansfield Digest of the Statute of Arkansas over the Indian Territory, and by section 671 of Mansfield Digest, it is provided that no deed or other instrument shall be valid as against a subsequent purchaser unless the same be recorded in the county (district) where the real estate is situated, unless the subsequent purchaser had notice of the prior deed.

By this Act of Congress (32 Stat. at Large 842), it is provided, that,

> "Such instruments *heretofore* recorded with the clerk of any United States Court in the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, *and such records heretofore made* shall be of full force and effect, the same as if made under this statute."

It is contended by the appellant that it became the duty of the deputy clerk at the Ryan Recording District to transfer the record of his deed to the Duncan Recording District. At this time we wish to again call the Court's attention to the fact that the deed of the appellant was executed subsequent to the creation by metes and bounds, the

Duncan Recording District, and by reason of which it was not the duty of the clerk at the Ryan Recording District to transfer the deed to the Duncan Recording District. The language used is "*such instruments heretofore recorded*", meaning thereby, all instruments recorded prior to the creation by metes and bounds the Duncan Recording District. Again, we wish to call the Court's attention to the fact that the clerk at Ryan was not such a clerk as contemplated by the Act of Congress *supra*, with reference to the transfer of recorded instruments from one place to another, for, by the Act of Congress of March 1, 1895, 28 Stat. at Large 695, there was a clerk for the entire Southern District, which clerk was authorized to appoint a deputy at each place of holding court, and the clerk at Ryan was a *deputy clerk*, and by reason of which the Act of Congress *supra*, 32 Stat. at Large 842, did not apply for the language used is that such instruments heretofore recorded *with the clerk of any United States* Court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute. In our judgment, this act is clearly inapplicable to the case at bar. Counsel for appellant says that this court has passed directly on this question in the case of Keys and Co., vs. First National Bank, 229 U. S. 179 (57 Law. Ed. 1141), but we disagree with him, and say that the Supreme Court of the United States in the case of Astor vs. Wells et al, 4 Wheatio 616, has passed on the question and holds that where a new county is created out of an old county and a deed is executed after the creation of the new county, the recording of the deed in the old county is not effective

as against a subsequent purchaser. In re Astor vs Wells *supra*, at page 622, it is said:

> "The land was originally comprised within the limits of Jefferson County. But before the recording of the deed the County of Tuscarawas was taken off from Jefferson County. The law of Ohio required the recording of a deed in the county where the land is situated. The first question is, was this a legal recording under the laws of Ohio, so as to preserve the priority which Dates gave to Astor? The office of Jefferson County was the legal office at the time of executing the deed; did it continue to be so at the time of recording it? This can only be decided by considering the object of the law. It was to give notice to subsequent purchasers—to place at their command the means of investigation, to which, if they did not resort they had only to blame their own indolence or folly But no one in search of such information respecting lands situate in Tuscarawas County would be expected to search the records of Jefferson County subsequent to the date of the separation. He would naturally refer to the records of the county in which it was originally comprised."

The Duncan Recording District was separated from the Ryan Recording District June 21, 1906, by the Act of Congress of June 21, 1906, Vol. 9, Fed. Stat. Anno. 215, and was definitely fixed by metes and bounds, and subsequent to this time, all persons inspecting the records would naturally refer to the records since this date, and by reason of which, we say that the appellees purchased the land in question without notice, either actual or constructive, of

the existence of the deed of the appellant. See also the following cases: Williams vs. Logan, 32 Ga. 168; Barney vs. Little, 15 Iowa, 536; Richardson vs. Shelby, 3 Okla. 68; Adams vs. Hayden, 60 Texas, 226; Reed vs. Kemp, 16 Ill., 451, and Garrison vs. Hayden, 19 Am. Dec. 70.

One of the main cases relied upon by counsel for appellant is that of Trimble vs. Edwards, 19 S. W. 772, but the Court will note that in that case, the legislative act creating the new county provided that until the new county was organized the old county retained jurisdiction. The case of Trimble vs. Edwards, *supra*, and the other Texas cases cited by counsel for appellant, while good law, in our judgment, the facts in those cases are quite different from the facts here.

We admit for sake of argument, that if the deed of the appellant had been executed and recorded at Ryan prior to the creation of the Duncan Recording District by the Act of Congress of June 21, 1906, that the deed would not have to be re-recorded at Duncan. It would appear to us that the reasoning in the case of Astor vs. Wells *supra*, applies to the case at bar, for there it was said:

> "But no one in search of such information respecting lands situate in Tuscarawas County would be expected to search the records of Jefferson County subsequent to the date of the separation. He would naturally refer to the records of the new county at its origin, and from that time pursue his inquiries among the records of the county in which it was originally comprised."

Following this doctrine are the following cases:

Green vs. Green, 103 Cal. 108; Garrison vs. Haydon, I. J. J. Marsh (Ky.) 222, 19 Am. Dec. 70; Greer vs. Missouri Lumber, etc., 134 Mo. 85, 56 Am. St. Rep. 489; Alt vs. Fullerton, 151 Mo. 598; Stewart vs. McSweeney, 14 Wis. 468; Bell vs. Fry, 5 Dana (Ky.) 344.

The case of Keys and Co. vs. First National Bank, 229 U. S. 179, relied upon by the appellant, was a case where the mortgage was recorded prior to the creation of the new Recording District, while in the case at bar, the deed of the appellant was not even executed until six days after congress had definitely created by metes and bounds the Duncan Recording District, and by reason of which, we say, the Keys case is not in point.

In the case of Keys and Co. vs. First National Bank, supra, by the supreme court of the United States it is said.

> "*Purchasers were charged with notice of territorial limits*, and that Mays Ranch had been in the old northern district at a time the registration office was located at Muskogee, and that they must look to see whether, during that period, sales had been made or mortgages given on property then located within the district."

As said before, had the deed of the appellant been recorded prior to June 21, 1906, it would not be necessary to again record his deed, for it was made the duty of the clerk of the United States Court to transfer the same to the newly-created recording district, but the clerk was not required to search the record for deeds and mortgages recorded since congress had created the Duncan Recording District, and transfer the same to the newly-created re-

cording district. The Act of Congress of June 21, 1906, the appellant and all other persons were charged with, so the question presented by the record here, is the deed of the appellant having been executed subsequent to the creation of the Duncan Recording District by metes and bounds by the Act of Congress of June 21, 1906, was it the duty of the appellant to see that his deed was recorded in Duncan, or could he record his deed at the old recording district, Ryan, and do nothing more until the 8th of June, 1911, when he files his suit and says that he is entitled to the land as well as damages for withholding possession from him. During these five years the appellees, having a right to rely upon the records of the Duncan Recording District, have been dealing with this property as their own, and no claim of ownership has been made by the appellant. It would appear to us that the equities of this case are with the appellees, and we feel that the cases cited by us herein sustain our position on the law of the case.

Now it would appear to us that the appellant would be required to take notice of the creation of the Duncan Recording District, and there being nothing in the Act of Congress creating this new district, that required the deputy clerk at Ryan to transfer all instruments of record up to and including the time a new deputy was appointed for the Duncan District, it would appear to us that it was the duty of the appellant to either wait until there was an officer with whom he could record his deed or wait until such deputy was appointed and then record his deed. The appellant did neither; did not even go into possession of the land; did no act that would guard his rights but waited from June 26, 1906 until June 8, 1911, and then filed suit for the land. For five years he was permitting innocent

purchasers and mortgagees to deal with the land as though they were the owners thereof. It would seem to us that the great delay in bringing this suit seeking the cancellation of the deeds and mortgages should preclude the maintenance of this suit.

We therefore assert that under our second contention the appellant has been guilty of laches to such an extent that a court of equity should deny him the relief asked.

In re Elerdorf vs. Taylor, 10 Wheat 168, it is said:

"It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims."

In re Wagner vs. Baird, 7 How. (U. S.) 259, it is said, that:

"Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and can not be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." See also the following cases:

Piatt vs Vattier, 9 Pet. 416. Maxwell vs. Kennedy, 8 How. 222; Badger vs. Badger, 2 Wall. 94, 2nd Story Eq. Jur., Sec. 1530; Underwood vs. Dugan, 139 U. S. 383; Hammond vs. Hopkin, 143 U. S. 250; Willard vs. Wood, 164 U. S. 524; Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S. 697; Cornell vs. Green, 43 Fed. 109; Kennedy vs. Cotner, 43 Fed. 710; Van Vleet

vs. Sledge, 45 Fed. 748;

There is nothing in the record to show why it was that the appellant permitted the appellees to deal with the land as though they were the legal owners, and it would seem to us that when they caused to be searched the records in the Duncan Recording District; caused abstracts to be made by the abstracter, and nothing was found affecting the title, the appellees did all that they were required to do, and when, coupled with the fact that the appellant waited for five years before laying claim to the land, that such laches on his part should, at least, be considered when determining the rights of the appellees who did all that any ordinary prudent person would have done.

Before closing we cannot help but call the special attention of the court to the very able opinion of our State Supreme Court as shown commencing on page 7 of record. It will be noted that the Supreme Court of Oklahoma was careful and pains-taking in writing it's opinion; it distinguishes the cases at bar from those cases like the ones cited by the appellant and from the opinion, we cannot help but feel that the Supreme Court of Oklahoma realized the well recognized doctrine in equity "that where a person has been negligent in his acts and deeds and by such acts and deeds he has caused another to be misled, that he cannot insist upon his legal rights against the rights of the other person who has acted in good faith."

The appellees were permitted to deal with the land in controversy in a matter which was recognized as their property for a period of five years; paying taxes on the land; collecting rents therefrom; mortgaging the same,

and otherwise using the same in every known way, and in all of which the appellant acquiesced.

Had the appellant used the precaution to have recorded his deed immediately after the deputy clerk was appointed at Duncan this long drawn out law suit would have been avoided. By the neglect of the appellant, can he ask a court of equity or a court of law to help him, we think not.

We respectfully submit that the opinion of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

H. A. LEDBETTER,
Attorney for Appellees.